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No. 347

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALGIE ROE ROBERSON, EVERETTE LEE HOLLINS, AND CHARLES RICHARD GRIFFITH, PETITIONERS

v.

UNITED STATES OF AMERICA,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on July 20, 1960 (Pet. App. 11-12). The petition for a writ of certiorari was filed on August 19, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the conviction of the petitioners for conspiracy to violate the liquor laws should be reversed because of alleged errors occurring during their trial.

STATUTE INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * *

STATEMENT

The petitioners, Roberson, Hollins and Griffith, and a number of other defendants were charged in a one-count indictment in the United States District Court for the Eastern District of Tennessee with conspiracy to violate various internal revenue statutes relating to the possession, control, and taxes upon spirituous liquors (R. 7-15). The jury found all three of the petitioners guilty (R. 3). The court sentenced Mr. Roberson to imprisonment for five years, and Messrs. Hollins and Griffith to three-year terms (R. 30-34). On appeal (R. 38-43) the convictions were affirmed (Pet. App. 1-12).

Since the petitioners do not challenge the sufficiency of the evidence in this Court, we set out only a sum-

mary of such evidence as relates to the points which they raise in their petition.

1. At the start of the trial Mr. Badgett, counsel for Mr. Roberson and Mr. Griffith, requested that the defense be given copies of all written statements of government witnesses, but the court overruled the motion, noting that counsel would not be entitled to such a statement until after a witness had testified (R. 51-52).

During the direct testimony of the witness Orr, this colloquy occurred (R. 100-101):

> MR. DUGGER: If the Court please, I would like the record to show that I gave Mr. Badgett a copy of the signed statement furnished by this witness.
>
> THE COURT: That's good, Mr. Dugger. And, if you can, any other witnesses, where it isn't prejudicing either side in any way, without prejudice to any part[y], either of the defendants or the government, any cooperation that can be afforded by the parties, that will accelerate the trial, without prejudice to anybody, that will be welcomed by the Court and I am sure by the jury and everybody concerned.
>
> MR. BADGETT: I got it just now, your Honor. It will take some time to read it.
>
> THE COURT: All right.

Defense counsel was given time to read Mr. Orr's statement before proceeding with cross-examination (R. 109, 144).

On the cross-examination of another government witness, Mr. Andrews, the following occurred (R. 168-169):

MR. BADGETT: Now, Your Honor, if the government has a statement from this witness, I would like to see it, either a written or a verbal summary.

THE COURT: All right, sir.

MR. DUGGER: Let the record show that a copy of the statement was given to Mr. Badgett.

MR. BADGETT: Yes. Let the record show, too, it was at the time I started to cross-examine him.

MR. DUGGER: If the Court please, I object to that statement. Mr. Badgett knows that under the law that's when he is entitled to receive the statement, and I object to him making such a statement as that before the jury.

THE COURT: Now, ladies and gentlemen of the jury, under the recent act governing these statements, counsel was entitled to the statement which was given by this boy to the government, and this act was passed in response to what was known as the Jencks decision, and it provides in substance, when a witness goes on the witness stand and testifies to certain statements, that he has given a statement to the government that contains those same statements, then the accused party on trial or his counsel may have it, may have such statement, for the purpose as it is desired.

Now, gentlemen, there is no use to get in an argument over matters of this kind. The law has been explained to you about that.

The court allowed defense counsel to reserve cross-examination for over-night study of another witness' statement (R. 231), and permitted counsel additional time to read over other statements of still

other government witnesses before proceeding with their cross-examination (R. 302, 322-323).

2. During the direct examination of a government agent, Mr. Orr, the following occurred (R. 53-54):

> MR. BADGETT: Your Honor, I want to object to reading the statement. He has got the statement in front of him and he is starting to read from it. That isn't fair to this jury or anybody.
>
> MR. DUGGER: If the Court please, I would like to state that this witness made observations on various dates from August up until January of this year, and under the law he has a right to refer to the notes he makes at the time in order to refresh his recollection of what happened on a particular date and a particular time.
>
> THE COURT: Yes. Mr. Witness, you may refer to your notes to refresh your recollection. Just refresh your recollection from the notes. You may be seated.
>
> MR. BADGETT: My point is this, your Honor. I agree that he has got the right to read that and refresh his recollection, but then to hold it open there and read from it to the jury isn't evidence. It doesn't rate the dignity of evidence.
>
> THE COURT: You may look at it but just use it for the purpose of refreshing your recollection.

Later during the direct examination of the same witness, a similar defense objection was made, to which the court responded (R. 64):

> He has a right, Mr. Badgett, to look at the statement and refresh his recollection. Now, I hope you don't read the statement Mr. Orr, but you have a right to have it before you and use

it to refresh your recollection. I overrule the objection to that extent. Go ahead.

3. Petitioners Roberson and Hollins did not testify, but petitioner Griffith did (R. 383). Several times during the trial, the prosecutor asked Mr. Roberson (R. 62, 167) and Mr. Hollins (R. 81, 151) to stand to be identified by government witnesses, and no objection was made to this procedure. In one instance, when Mr. Hollins' counsel was cross-examining a government witness, he told Mr. Hollins to stand up for identification (R. 110-111).

4. Petitioner Roberson's automobile had been used to bring the whiskey from the still to the distribution point in Chattanooga (R. 75-76, 248, 251-252, 253). Mr. Orr testified without objection that on September 10, 1958, when this car was in a garage having the wheels aligned, he noticed that it "bore the strong odor of moonshine whiskey and also a sweet smelling perfume" (R. 78, 79). Another government agent, Mr. West, testified without objection that on October 16, 1958, when this car with the right window down was parked in the new car department of an automobile company, he could smell a strong odor of moonshine whiskey (R. 308, 311-312).

5. At the start of the trial, defense counsel requested the rule excluding witnesses from the courtroom. The government asked that it be permitted to keep Mr. West as its representative, and the court approved (R. 50). When Mr. West, who had participated in the surveillance of the petitioners' activities, started his testimony as the last government witness, this colloquy ensued (R. 306-307):

MR. BADGETT: Your Honor, we want to object to this witness giving any testimony. The rule was requested and he has been in this court room every minute of this trial. And, if they intended to use him, I think they should have used him before he heard any of the testimony. Under the rule he was only asked to be in here as a government representative, and it wasn't stated he was to be a witness, so the rule should apply to him. And we object to his testimony.

MR. DUGGER: If the Court please, that has been the practice in this district ever since I have been in the district and before that. The government is entitled to have a representative to sit at the counsel table to aid the United States attorney, as was the practice when Mr. Badgett was in the United States attorney's office. Mr. Badgett knows that is the practice. I don't know why he is objecting unless he wants to call attention to the jury. But I think this witness is entitled to testify.

THE COURT: The objection is overruled.

6. Mr. Orr testified that on August 26, 1958, government agents went with a search warrant to the premises at 1022 Pine street and seized two five-gallon cans of moonshine whisky, a filter system, and some empty jugs and cans. Defendant Smith was arrested (R. 69-70). When the agent was asked whether Mr. Smith made any statement, the following colloquy occurred (R. 70-72).

MR. BADGETT: Now, your Honor, the jury should be instructed on that. I request that anything he might have said certainly would not be admissible.

THE COURT: Yes. Anything Smith may have said will only bear on Smith's case, unless a

conspiracy is established, and it is shown that Smith along with others were part of that conspiracy. If the statements were made in pursuance of the conspiracy and if the conspiracy is established, then the statement may have a bearing on those who were in the conspiracy, if any. But at this time the statement will only be considered with respect to Smith's case unless the jury finds that a conspiracy was established and others were in it.

MR. BADGETT: May I respectfully suggest, your Honor, that the statement also would have to be in furtherance of the conspiracy before it would be admissible?

THE COURT: That's right. That's what I told you. Yes, it would have to be in furtherance of the conspiracy before it would be binding on the alleged conspirators. And, remember, before there can be a conspiracy there must be two or more parties to that conspiracy. One person cannot conspire with himself. All right.

The agent then testified that Mr. Smith said that he had been working for Mr. Hollins for three or four years, that he received 50 cents a gallon for delivering the whiskey, that he had used the 1949 Mercury coach owned by Mr. Hollins to deliver the whiskey (R. 71-72). A second agent gave testimony, admitted without objection, substantially corroborating Mr. Orr's testimony about what Mr. Smith had said at the time of his arrest (R. 194-195).

Another witness testified that on December 11, 1958, he assisted in the arrest of defendant Nichols, who admitted that "he had been delivering whiskey from 1022 Pine Street for about three months for 50

cents a gallon" (R. 230). There was no defense objection to this testimony.

7. A government witness started to testify about an address book taken from defendant Smith at the time of his arrest. The attorney for petitioners Roberson and Griffith objected that this would not be admissible against his clients. The court ruled: "Well, no, it wouldn't. Anything that he said would not be binding on any of the other parties in the lawsuit unless the jury finds that there was a conspiracy and if the jury further finds the statement allegedly made by him was in furtherance of the conspiracy" (R. 195-196). The witness testified that in the address book he found a notation "Ga Boy and alongside that the number 5-3004." (R. 196).[1] When the government offered the book in evidence, the following occurred (R. 197):

> MR. BADGETT: We have no objection, your Honor. I want the jury to see this.
>
> THE COURT: All right.
>
> MR. BADGETT: Other than the objection I have stated, unless it is tied up, it isn't admissible.
>
> THE COURT: Yes. Hasn't the Court explained that?
>
> MR. BADGETT: I think so.

8. Petitioner Roberson's son testified as a defense witness that his father was engaged in business as a garage mechanic and had done work on cars for

---

[1] Petitioner Roberson was known by the nickname of "Georgia Boy" (R. 161, 354). Mr. Roberson's telephone number was Amherst 5-3004 (R. 154).

Messrs. Griffith and Hollins (R. 372-374). On cross-examination this colloquy occurred (R. 378):

> Q. And he [petitioner Roberson] has been in the moonshine business, too, hasn't he?
> A. I don't know—not that I know.
>
> * * * *
>
> Q. Not that you know of?
> A. No.
> Q. Haven't you been down here to the court room before?
> A. Yes, sir, I have been down here to the court.

Defense counsel then moved that this evidence be stricken, refused the government attorney's offer to withdraw the question, and asked for a mistrial on the ground that an improper reference had been made to a previous conviction (R. 378-379). After overruling the motion and recalling the jury, the court instructed as follows (R. 379-380):

> Ladies and gentlemen of the jury, Mr. Dugger, the assistant district attorney, asked Mr. Roberson, who is now on the witness stand, in substance if he didn't know that Mr. Roberson, senior, had been in the moonshine whiskey business, and Mr. Roberson, now on the witness stand, said no.
>
> That question is incompetent for any purpose. Just don't consider it.
>
> Mr. Dugger asked Mr. Roberson, Jr. again if he hadn't been down here in court and heard something, or in substance that. That question is not competent for any purpose and don't consider it. Don't consider it.
>
> * * * *

ARGUMENT

1. There is no merit in the petitioners' contention (Pet. 7-8) that the court erred in refusing to give defense counsel copies of statements by the government witnesses before their direct examination. The procedure followed by the court was in compliance with the Jencks Act, 18 U.S.C. 3500, under which a statement is not producible for inspection until after the "witness has testified on direct examination." The court allowed defense counsel extra time to study the statements where counsel deemed this necessary for purposes of cross-examination (R. 109, 144, 231, 302, 322-323).[2]

There was no impropriety in permitting the jury to know that the government had turned over statements of government witnesses to the defense. No objections on this ground were raised when the government attorney announced delivery of the statements (R. 100, 168). In view of the fact that defense counsel in the presence of the jury had made an unsuccessful motion for delivery of the statements by the witnesses at the start of the trial (R. 51), it was not unreasonable to allow the jury to know that the prosecution had delivered the statements later in compliance with the statute.

2. The record discloses no improper reading of statements by government witnesses and no trial by affidavit rather than evidence, as the petitioners claim

[2] In one instance defense counsel received the statement of witness Orr even before the conclusion of his direct examination (R. 100-101).

(Pet. 8). Presumably the instances referred to are those set out in the direct examination of Mr. Orr, a government witness, (*supra*, p. 5). On both occasions, defense objections were made as soon as the witness started to answer the question, thus indicating that he had merely looked at the statement to refresh his recollection. The court announced the correct rule that the witness could use the statement only for the purpose of refreshing his recollection, and the witness complied with this admonition.

3. There was no error in the procedure under which petitioners Roberson and Hollins stood up for identification by government witnesses (Pet. 8-9; Statement, *supra*, p. 6). Neither party was compelled to give testimony in violation of the Fifth Amendment, and no objection was made. While Mr. Hollins did testify as to his name in answering the prosecutor's question (R. 151), in another instance his own attorney asked him to stand for identification (R. 110-111). There was no error. See *Holt* v. *United States*, 218 U.S. 245, 252-253.

4. There was no illegal search of the car used to transport the whiskey (Pet. 9; Statement, *supra*, p. 6). There was nothing improper about the agents' presence at the garage and automobile company's premises, which were open to the public. The experienced agents were competent to testify that from their sense of smell they recognized the odor of moonshine whiskey. Cf. *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C.A. 2).

5. There was no error in permitting Mr. West to testify as as a government witness, even though he

had remained in the courtroom as a government representative from the start of the trial (Pet. 9; Statement, *supra*, pp. 6-7). The exclusion of witnesses is a matter resting in the sound discretion of the trial court. There was no abuse of that discretion in view of the rule that an officer in charge of a criminal case may be permitted to remain in the courtroom to advise government counsel, even though he himself testifies as a witness. Cf. *Powell* v. *United States*, 208 F. 2d 618, 619 (C.A. 6), certiorari denied, 347 U.S. 961; *Schoppel* v. *United States*, 270 F. 2d 413, 416-417 (C.A. 4).

6. The petitioners contend (Pet. 9-10) that the court erred in permitting testimony that, after his arrest, defendant Smith told Mr. Orr that he had been receiving 50 cents a gallon for delivering whiskey and that he had used petitioner Hollins' car for this purpose. It is said that this statement was not in furtherance of the conspiracy and occurred after the conspiracy had ended. At the time of Mr. Smith's statement on August 26, 1958, however, the conspiracy had not ended. There was evidence of overt acts, in which Mr. Smith himself and the petitioners engaged, occurring as late as November 21, 1958 (R. 14-15, 316-322). If the jury found that the statement was not made in furtherance of the conspiracy, under the court's instruction, they would not consider it binding upon the petitioners as co-conspirators. In any event, this was a minor bit of evidence relating only to Mr. Hollins. If there was error in admitting Mr. Smith's statement it was, as held by the court below, harmless (Pet. App. 8).

The statement by defendant Nichols after his arrest (Statement, *supra*, pp. 8-9), came in without objection. There was nothing in the attendant circumstances to lead the jury to believe that this statement could be used against any of the defendants other than Nichols himself.

7. There was no error in admitting evidence that defendant Smith at the time of his arrest had an address book with a notation referring to petitioner Roberson as "Georgia Boy" and giving his telephone number (Pet. 10; Statement, *supra*, p. 9). After government counsel stated that he wanted to introduce the book in evidence, defense counsel examined it and announced, "We have no objection, your Honor. I want the jury to see this" (R. 197). No challenge was made as to the validity of the arrest or the seizure of the address book. The evidence was relevant in tying in Mr. Smith and Mr. Roberson as conspirators in the enterprise, and defense counsel unequivocally approved of its admissibility. In this context the court did not err in admitting this evidence.

8. The court adequately corrected the indirect, if improper, reference, during the testimony of petitioner Roberson's son, to an alleged previous conviction of Mr. Roberson for a whiskey violation (Pet. 10-11). The court, in its contemporary instruction, explicitly directed the jury to disregard as incompetent the questions and answers relating to this matter. It must be assumed that the jury followed this clear admonition by the court. Cf. *Opper* v. *United*

States, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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